IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-948

JOSEPH N. ZANNINO, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rules, Constitutional & Statutory Provisions

INDEX TO APPENDIX

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The Petitioner, JOSEPH N. ZANNINO, JR., requests that a Writ of Certiorari be issued to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered October 11, 1977 and the Petition for Rehearing which was denied on November 4, 1977.

OPINION BELOW

Petitioner was convicted before the U.S. District Court for the Middle District of Pennsylvania on March 11, 1977 (A. 4). The Judgment of the U.S. Court of Appeals for the Third Circuit is an unpublished opinion decided on October 11, 1977, affirming the action of said District Court (A. 1). The Court of Appeals denied a Petition for Rehearing by its Order dated November 4, 1977 (A. 3).

JURISDICTION

The Judgment of the U.S. Court of Appeals for the Third Circuit was entered on October 11, 1977 (A. 1). A timely Petition for Rehearing was thereafter filed, after which the Court of Appeals denied the Petition by its Order dated November 4, 1977 (A. 3).

The U.S. Court of Appeals granted Petitioner's Application for Stay of Mandate until December 4, 1977 by its Order dated November 15, 1977 (A. 5).

On November 21, 1977, an extension of time to Petition this Honorable Court for Writ of Certiorari, to and including January 3, 1978, was approved by Mr. Justice Brennan.

The U.S. Court of Appeals granted Petitioner's Application for Further Stay of Mandate until January 3, 1978 by its Order dated November 28, 1977 (A. 6).

The jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C., Section 1254 (1), and Rule 22 (2).

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals commit error by not requiring the District Court to vacate its sentence and ordering the District Court to specifically perform the terms and conditions of that certain "plea bargain agreement" entered into with Petitioner; or in the alternative, ordering that the sentence be vacated and imposed by a Judge from a different District, and that the "plea bargain agreement" be urged by an Assistant United States Attorney other than the prosecutor who made the agreement?

2. Whether under the Doctrine of "Separation of Powers", as derived from the provisions of the Constitution establishing three separate, but co-equal branches of government, the judiciary branch, in the exercise of sound sentencing discretion, has the power to reject a Rule 11 (e) (1) (C) agreement entered into in good faith between an Assistant United States Attorney exercising his executive prosecutorial discretion and a defendant, because the Court believes that the bargain made by the prosecutor was not in the best interests of justice.

3. Whether the District Court abused its sound sentencing discretion in rejecting a Rule 11 (e) (1) (C) plea bargain agreement made in good faith between an Assistant United States Attorney and Petitioner, with consideration in the form of cooperation given to the Government additional to the guilty plea itself, solely because the Court believes that it would not be in the interest of justice to honor the agreement.

4. Whether the District Court abused its judicial discretion by merely offering Petitioner the opportunity to withdraw his plea of guilty, to which alternative Petitioner is opposed,

where, as herein, Petitioner cannot be returned to *status quo ante* because his codefendants are now out of the case and undoubtedly hostile, having pleaded guilty and been sentenced as a result of Petitioner's plea bargain.

5. Whether the District Court abused its judicial discretion to accept or reject the plea bargain agreement as provided by Rule 11 (e) (2) by relying on the presentence reports of co-defendants who pleaded guilty as a result of the cooperation given to the Government by Petitioner pursuant to the agreement.

6. Did the District Court abuse its judicial discretion as a matter of law in failing to provide Petitioner with the exact nature and source of the information which was the basis for the Court's rejection of the plea bargain and in failing to give Petitioner an opportunity to rebut the information?

7. Did the District Court abuse its judicial discretion in failing to grant Petitioner's prayer for relief – that if specific performance of the bargain not be rendered, then sentence be vacated and be imposed by a judge from a different district and the plea bargain be recommended by an assistant United States Attorney other than the prosecuting attorney?

8. Did the prosecutor fail to abide by his duty under Rule 11 (e) (1) (C) to effectively recommend the terms of the plea bargain agreement to the District Court?

STATUTES, CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Constitution of the United States

Article II, Section 1

> "The executive Power shall be vested in a President of the United States of America. . ."

Article II, Section 3

> "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; *he shall take Care that the Laws be faithfully executed*, and shall Commission all the Officers of the United States."

Article III, Section 1

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . ."

Article III, Section 2

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ."

Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation."

Rule 11 - Federal Rules of Criminal Procedure
PLEAS

"(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report."

Rule 32 – Federal Rules of Criminal Procedure
"SENTENCE AND JUDGMENT"

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the

government shall have an equivalent opportunity to speak to the court.

(2) **Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) **In General.** A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) **Criminal Forfeiture.** When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleased guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) Disclosure.

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the

opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c) (3) (A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. §§ 4208(b), 4252, 5010(e), or 5034 shall be considered a pre-sentence investigation within the meaning of subdivision (c) (3) of this rule.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(f) Revocation of Probation. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

STATEMENT OF THE CASE

This case involves a criminal appeal from the U.S. District Court for the Middle District of Pennsylvania, to the U.S. Court of Appeals for the Third Circuit. The parties will be referred to as "Petitioner" and "Respondent" respectively.

This appeal does not involve conflicting probative evidence resolved by a Court in the course of an evidentiary proceeding. Rather, because of the nature of proceedings under Rule 11 [Pleas] and Rule 32 [Sentence and Judgment], Federal Rules of Criminal Procedure, the most significant "facts" supporting the Court's adjudication of the Petitioner are those in documents, that is, in the Indictment, transcripts of the Plea and Sentencing Hearings, Pre-Sentence Reports of Petitioner and his codefendants, Motions and Docket Entries.

On September 23, 1976, Petitioner, JOSEPH N. ZANNINO, JR., and his codefendants, Messrs. Robert E. Light and Herman Pinnon, were indicted in the U.S. District Court for the Middle District of Pennsylvania. The Indictment consisted of three Counts. In Count I, Petitioner, Pinnon and Light, were jointly charged with conspiracy to violate the "Federal Travel Act", Title 18 U.S.C. §1952, to commit arson in violation of the Law of Pennsylvania. In Court II, said codefendants were jointly indicted with the substantive charge of commission of acts of travel in furtherance of the conspiracy, in violation of said Act; and in Count III, Petitioner and codefendant Light were likewise jointly charged with different acts of travel in furtherance of the conspiracy.

The pertinent "facts" of the conspiracy described in Count I, state, inter alia, that codefendant Light (owner of the Light

Coach Company premises) conspired with and agreed to pay Petitioner and codefendant Pinnon to commit arson on his said premises [two other individuals, Carl Fletcher and James Brown were named as unindicted co-conspirators]; that on October 2, 1975, Petitioner, codefendant Pinnon, and the unindicted co-conspirator, Mr. Brown, drove to the said premises; and *that on the same day Pinnon and the said Mr. Brown* "set a fire at the Light Coach Company, Lebanon, Pennsylvania." Thereafter, prior to and on January 16, 1976, Mr. Light endorsed a total of $78,100.00 in checks from the Insurance Company of North America. (A. 7)

At arraignment on October 14, 1976, Petitioner pleaded not guilty to all Counts, as did Light on September 30, 1976 and Pinnon on October 13, 1976. The Court set January 10, 1977 as the date of trial for all defendants.

During November and December of 1976, extensive negotiations occurred between J. Phillip Krajewski, the Assistant U.S. Attorney prosecuting the case, and Victor L. Schwartz, Petitioner's then attorney, both as to plea negotiations and sentence negotiations, resulting in a Rule 11 (e) (1) (C) agreement, with the terms of the bargain being the following:

(a) Petitioner would plead guilty to both counts of the indictment, admitting his guilt therein;

(b) Petitioner would give a detailed statement as to the participation of the other defendants and co-conspirators;

(c) Petitioner would testify against the other defendants if they proceeded to trial;

(d) Respondent would agree that a specific sentence, to wit, five years probation and a $10,000.00 fine, payable within a year, would be the appropriate disposition of the case.

No plea bargains were discussed by the prosecutor with either of Petitioner's codefendants, Messrs. Light and Pinnon, that would have involved a sentence of probation for either of them.

After the plea bargain had been made, and prior to January 5, 1977, Petitioner telephoned Pinnon and informed him that he had made a "deal" with Mr. Krajewski. According to Petitioner, Pinnon berated him, stating: "We could have beat this". Petitioner responded: "I have a wife and eight children to consider". Pinnon replied, as testified by Petitioner: ". . . that's not all you have to worry about". Mr. Schwartz reported this threat to Mr. Krajewski. Petitioner also testified that his attorney informed the attorney for codefendant Light and stated: "And then my attorney told Mr. Light's attorney, he jumped up about it because they expected to go to court and fight".

There is no doubt in Petitioner's mind that he had incurred the gravest sort of animosity against himself by his codefendants, Messrs. Pinnon and Light, as a result of his plea bargain with the Respondent.

On January 5, 1977, in open court, upon Motion by Petitioner to withdraw his plea of not guilty and to enter a plea of guilty to Counts I and III of the Indictment, the Court questioned him to ascertain that his change of plea was voluntarily and intelligently made. In accordance with Rule 11 (3) (d), the Court neither formally accepted or rejected the plea of

guilty, but allowed it to be entered on the record with the admonition that the Court would defer final decision until there had been an opportunity to consider the pre-sentence report.

Mr. Krajewski informed the Court of the terms of the agreement in the following words:

> "Your Honor, there is a plea agreement in this case. The plea agreement in this case, your Honor, is that the defendant, Joseph N. Zannino, enter a plea of guilty to the counts charged in the indictment, Count I and Count III, and he would then fully cooperate with the government and testify truthfully and honestly in the event this case goes to trial.
>
> And in exchange for that plea and that cooperation and that testimony, by Mr. Zannino, at the time of sentencing the government would recommend five years probation, a Ten thousand dollar fine, and would allow – at least recommend to the Court that the Ten thousand dollars be able to be paid over a year.
>
> * * * *
>
> Your Honor these are the conditions under which Mr. Zannino is tendering his plea. In other words, we would like to put off sentencing until after the trial.
>
> * * * *
>
> (The Court) The trial of the other two is set for Monday, I believe?

(Mr. Krajewski) Yes, your Honor.

(The Court) And, of course, we will expect you to be here Monday or Tuesday, whenever you require him."

The Court advised Petitioner on the plea bargain as follows:

"The plea bargain is not binding on the Court, in any event. I wouldn't indicate now whether I would accept it or whether I wouldn't accept it because if he pleads guilty, then I want a pre-sentence investigation and a report and I would want to see from that what type of man he was, what habits –

* * * *

If I accept his plea of guilty and after I hear all of the evidence and the pre-sentence investigation report and I feel that's an improper thing, he can withdraw his plea and change it and some other judge would hear it."

Satisfied that there was a factual basis for Petitioner's plea of guilty, the Court permitted him to enter pleas of guilty to Counts I and III, and ordered a pre-sentence investigation.

On the same day, namely January 5, 1977, Mr. Krajewski issued a summons to Petitioner to appear as Respondent's witness against the codefendants on January 10, 1977, the scheduled trial date. (A. 12)

Petitioner at all times abided by the terms of his plea agreement and was prepared to testify against his codefendants.

This was not required of him for on January 7, 1977, codefendant Light submitted a Motion to withdraw his plea of not guilty, and the Court entered an Order allowing the Motion, followed by Light's plea of guilty to all three Counts of the Indictment. The Court deferred sentencing pending receipt of a pre-sentence report. On the date of trial, namely January 10, 1977, codefendant Pinnon moved the Court to withdraw his plea of not guilty, which the Court allowed and so ordered, followed by Pinnon's plea of guilty to Counts I and II. The Court deferred sentencing pending receipt of a pre-sentence report.

The Docket Entries indicate that the Court had originally scheduled Petitioner to be sentenced on February 18, 1977. However, on February 16, 1977, Petitioner's sentencing was generally continued, followed by notice that all the defendants – Messrs. Zannino, Light and Pinnon – would be sentenced at 10:00 a.m. on February 25, 1977.

On February 25, 1977, Petitioner was advised by the Court that it would not accept the plea bargain entered into between him and the Respondent and asked the Petitioner whether he desired to persist in his guilty plea with a disposition less favorable than that contemplated by the plea agreement, or whether he desired to withdraw his plea, whereupon the Court would list the case for trial. The Petitioner, having read his pre-sentence report and finding nothing therein which would cause the Court to reject the plea agreement, asked the Court either to have an opportunity to read the pre-sentence reports of the codefendants, or to be advised by the Court whether there were any statements by the codefendants as to Petitioner's background or his participation in the crime which were detrimental to Petitioner, so that he would have an opportunity, if possible, to rebut them.

The Court advised Petitioner that neither of his requests would be granted. Petitioner informed the Court that he freely acknowledges his guilt and that it was psychologically impossible for him to withdraw his plea and proceed to trial. At that time the Assistant U.S. Attorney prosecuting the case, J. Phillip Krajewski, was not in attendance and the sentencing was handled by Assistant U.S. Attorney Paul Killion. Mr. Killion did not say one word in an effort to urge upon the Court to accept the plea bargain.

The Court frankly indicated that he had relied on the presentence reports of all three of the defendants, by stating:

> "Frankly, I have studied the presentence reports of all three men and I'm sure that in making my determination that I relied on everything that I learned from the case. Whether it was from the official report of what happened or whether it was from the other presentence reports, I am not prepared to say at this time.
>
> I have read all of them very carefully and I have not only Mr. Zannino's statement, but I have the official statement which you have, too."

At the request of Mr. Schwartz, Petitioner's then attorney, the Court postponed sentencing until March 4, 1977 to allow Mr. Schwartz time to research the law and to advise Petitioner on his rights in view of the Court's rejection of his plea bargain.

The Count on the same date, namely February 25, 1977, sentenced codefendant Light to one year on Count I; five years or Count II to run consecutive to Count I; and suspended sentence on Count III with probation for five years consecutive to Count II and restitution for losses to the insurance company.

The Court recommended the Federal Correction Institution, Danbury, Connecticut, as the place of confinement. Co-defendant Pinnon was sentenced to one year and $10,000 fine on Count I; and five years on Count II to run consecutive to Count I [on March 30, 1977 the fine was reduced $5,000]. The Court recommended the Medical Center for Federal Prisoners, Springfield, Missouri, as the place of confinement. Both codefendants were made eligible for parole under Title 18, U.S.C., Section 4205 (b) (2) – solely as to Count II – at such time as the Parole Commissioner may determine.

At the March 4, 1977 sentencing, Petitioner's then attorney, Mr. Schwartz, urged the Court to accept the plea bargain. He argued that the Court's power and discretion to reject a plea is not absolute and that the Court must determine that the bargain which was entered into by the Government was an abuse of prosecutorial discretion, citing *United States v. Ammidown*, 497 F.2d 615 (C.A. D.C. 1973). Mr. Schwartz requested additional time to research the law so that he could advise Petitioner whether he would have the right to appeal if an objection was noted to the Court's refusal to accept the plea bargain and the Court would then proceed to sentence. During the course of this sentencing proceeding, Mr. Krajewski, the Assistant U.S. Attorney who entered into the plea bargain with Petitioner, was in attendance. He, however, totally failed, in accordance with his legal commitment, to urge upon the Court to accept the plea bargain.

In the course of urging the Court to accept the plea bargain, Mr. Schwartz further argued that Respondent must have concluded that Petitioner's cooperation was critical in obtaining convictions against codefendants Light and Pinnon; and, under the circumstances, the Court cannot substitute its judgment for that of the prosecutor. The Court's response was:

> "I don't know that it did. Counsel for the other side said it did not. Mr. Goldberg did, I think other counsel said that, too."

However, the Court granted a continuance so that the Court and counsel could further research the law. Sentencing was reset for March 11, 1977.

On March 11, 1977, the sentencing hearing was commenced by Mr. Krajewski, who stated to the Court the terms of the plea bargain, as follows:

> "Your Honor, the government, at the time that the plea was entered in January, entered into a bargain with the defendant. At this time the government wants to fulfill its part of the bargain and recommend sentence to the Judge in this case which would be: A sentence of five years probation and a Ten thousand dollar fine. It would be suggested to the Court – or recommended – that the Ten thousand dollar fine be allowed to be paid over the course of one year.
>
> This recommendation is given for consideration at the time the defendant did give a statement to the government as to his involvement in this case and agreed to testify at trial against the other two defendants who, at that time, were still facing trial. That was the consideration for his testimony. The testimony was deemed by the government to be important to the case and therefor the bargain was made."

The Court then briefly summarized the events of Petitioner's prior sentencing hearings and stated:

"What does he want to do today, is he ready for sentencing today?

Mr. Zannino, are you ready to be sentenced or do you want to change your plea to not guilty, what is your decision?

(Mr. Zannino) Yes, your Honor.

(The Court) You want to be sentenced today?

(Mr. Zannino) Yes, under the direction of my attorney.

(The Court) Go ahead, Mr. Schwartz."

Mr. Schwartz thereupon described at length to the Court the essentials of Petitioner's background which, in addition to the contents of Petitioner's pre-sentence report, briefly indicated that: he was 48 years old; a funeral director who has been gainfully employed all of his life; married to the same woman for 20 years; has eight children, whose ages range between 6 and 19, all of whom he supports except the eldest who recently married; he had never been arrested, not even as a juvenile, prior to this case; his background was excellent; and he was a substantial citizen as indicated by his communal and civic involvements. Furthermore, Petitioner had honorably fulfilled his military obligations in the Korean War by rendering active duty as a funeral director in Japan.

At the Court's request, Petitioner then made a statement of his involvement in the commission of the arson stating, inter alia, that codefendant Pinnon bought the timing device; that the gasoline was placed in the trunk of codefendant Light's car; that he did not throw the gasoline around; and he admitted putting codefendant Light in touch with codefendant Pinnon.

The Court, referring to Petitioner's pre-sentence report, noted that he had said he was "to get a third of the money" and added:

> "You said – somebody said that you were to get a third of $8,000. For just driving them you were to get a third of $8,000."

* * * *

"How much did you accept?"

Petitioner replied:

> "I wound up with about $1,800. And of that money, I can honestly guarantee you that there is not one penny plus."

The Court's questioning of Petitioner's participation in the conspiracy and arson alerted Mr. Schwartz to observe to the Court:

> "With your Honor's permission, it is now apparent to us that, in fact statements of the codefendants have influenced the Court and indicated that Mr. Zannino –
>
> (The Court) I have information from the Probation Department of these things that I am suggesting and he denies them."

Mr. Schwartz, in response to the Court's emphasis on the contents of the codefendants' presentence reports, stated:

> "If these factors, your Honor, are serious considerations and they are obviously serious, they make all the difference in the world, your Honor, because certainly when I come here as an advocate and when I negotiate with – by the way, if Mr. Krajewski has evidence, and these statements can be corroborated, let him speak up, let him put that on the record."

Other than Mr. Krajewski feebly reciting the terms of the plea bargain and merely stating that the Court should accept it, he did not reply to Mr. Schwartz's challenge. Moreover, it was apparent from Mr. Krajewski's demeanor and tone of voice that he was not, in fact, abiding by his commitment and fulfilling the Government's obligation to urge upon the Court to accept the plea bargain.

The Court, prior to imposing sentence, stated:

> "I am going to impose sentence at this time and if you can establish later on that the things you mentioned are true and if you can establish that the major ones are not true and that his part in the offense are not as great as I believe it was, you can at that time move for a change in the sentence. But I am going to sentence him as I sentenced the other two, because I believe sincerely that he had a complete one-third role in it, I can't believe otherwise."

The Court had indicated in the course of the hearing that the plea bargain was an abuse of the prosecutor's discretion, and that he was rejecting it because the official version of the facts indicated that Petitioner's participation in the crime was much greater than revealed to either the Respondent or to the Court when he changed his plea to guilty. Moreover, the Court indicated that the information it was

relying upon was a result of statements made by the co-defendants and without corroboration thereof.

The Court sentenced Petitioner to one year and $10,000.00 fine on Count I, to stand committed until the fine was paid, and five years on Count III to run consecutive to Count I; and as to the sentence imposed on Count III, that he shall become eligible for parole under Title 18, U.S.C., Section 4205 (b) (2) at such time as the Parole Commissioner may determine. Petitioner's request for confinement to a minimum security place of detention was evidently denied by the Court.

Timely notice of appeal was filed by Petitioner on March 17, 1977 and on March 18, 1977, the record on appeal was forwarded to the U.S. Court of Appeals for the Third Circuit. On or about April 1, 1977, prior to the filing of Petitioner's Brief on May 11, 1977, Petitioner filed a Motion with the Clerk of the District Court and mailed a copy to the Court again moving that specific performance of the plea bargain be rendered, or, in the alternative, that sentence be vacated and be imposed by a Judge from a different District and that the plea bargain be urged by an Assistant U.S. Attorney other than Mr. Krajewski. (A. 13) The District Court failed to grant either of Petitioner's prayers for relief.

The Petitioner, in his Brief to the appellate court, raised the issues of the failure of the Respondent to effectively recommend that he be placed on probation; that the District Court abused its discretion in not accepting the plea bargain; that the Court erred in failing to provide Petitioner with the exact source of the information and the specific information of Petitioner's greater participation in the offense and in failing to give Petitioner an opportunity to rebut this information;

that the Court in fact imposed a perjury sentence on the Petitioner; and that the Court abused its discretion in failing to grant Petitioner's alternate form of relief – that if specific performance of the bargain not be rendered, then sentence be vacated and be imposed by a judge from a different district and the plea bargain be recommended by an Assistant U.S. Attorney other than the prosecuting attorney.

Respondent filed a Motion on May 13, 1977 with the appellate court for leave to supplement the record with a letter dated April 8, 1977 from Mr. Krajewski to the Honorable R. Dixon Herman, Jr., the sentencing court, enclosing a copy of the report of an F.B.I. lie detector test recommended by Judge Herman at the request of Petitioner, taken on March 22, 1977 without the presence of counsel. On June 6, 1977, in answer to this Motion, Petitioner objected that it would be improper to supplement the record without also supplementing it by filing Petitioner's Motion for Determination and Hearing on the polygraph examination. [On or about April 1, 1977, Petitioner filed a Motion with the Clerk of the District Court and mailed a copy to the Court requesting a hearing on the polygraph examination and stating grounds therefor, together with a Memorandum in support thereof. (A. 16) There is no record that the Court acted upon this Motion.] Petitioner also requested that the record be further supplemented by the filing of a transcript of certain comments made by Judge Herman to codefendant Pinnon and his counsel at the sentencing of Pinnon, which relate to the effect of Petitioner's agreement to plead guilty and to testify against the codefendants. The appellate court granted Respondent's Motion (A. 1); it failed to grant Petitioner's requests.

Respondent's Brief was filed on June 8, 1977, stating that the Government fulfilled its obligation under the plea agreement; that the sentencing court acted within its authority in rejecting the sentencing terms of the plea agreement and imposing a prison sentence upon Petitioner; that the Court did not impose a perjury sentence; and that the Court did not base Petitioner's sentence upon unreliable information, nor did it refuse to reveal the source and substance of that information or provide Petitioner an opportunity to rebut it. *The Respondent's Brief defended the District Court's actions despite the fact that the Respondent had endorsed and recommended the plea bargain with the Petitioner to the Court.*

On June 17, 1977, Petitioner filed a Reply to Respondent's Brief, wherein he again argued that the Government failed to fulfill its obligation under the plea agreement, and, further, that where consideration is given by the Petitioner and received by the Government, additional to the plea of guilty itself, it is an abuse of discretion for the Court to reject the plea bargain under the circumstances of this case.

The appellate court heard oral argument on October 7, 1977 and in a brief per curiam Judgment Order dated October 11, 1977, affirmed the judgment of the District Court. (A. 1)

On October 25, 1977, Petitioner filed a Petition for Rehearing relative to the aforesaid Order of the appellate court and submitted a Brief in support thereof, wherein he contended that the basic issue raised by him in his appeal was whether the District Court abused its discretion in refusing to accept the plea bargain because said Court was of the opinion

that the bargain was not in the best interest of justice. Petitioner cited *United States v. Ammidown*, 497 F.2d 615 (C.A. D.C. 1973) and *United States v. Cowan*, 524 F. 2d 504 (5th Cir. 1975) and argued that one of the critical elements in both cases, as in Petitioner's case, was that the plea bargain did not merely entail an agreement by Petitioner in exchange for a recommendation for sentence or reduction of charges, but also cooperation of Petitioner. Further, that the necessity and importance of that cooperation is peculiarly a matter within the province of the prosecutor.

Petitioner further emphasized that the error of Respondent's averment in its Brief that Petitioner was to receive an equal share of the insurance proceeds may have erroneously led the trial court and the appellate court to believe that Petitioner's participation in crimes for which he was convicted was equal to that of the co-defendants. The record shows that Petitioner was to receive one-third of $8,000, of which he admits that he never received more than $1,800, while Paragraphs 13 and 14 of the conspiracy Count of the Indictment state that codefendant Light endorsed checks totalling $78,100 in fire insurance proceeds.

On November 4, 1977, the appellate court denied Petitioner's Petition for Rehearing. (A. 3) Petitioner on November 11, 1977 timely filed a Motion for Stay of Mandate until December 4, 1977 to apply for a writ of certiorari to this Honorable Court, which was so ordered by the appellate court on November 15, 1977.

Upon application filed with this Honorable Court on November 21, 1977 by Samuel A. Culotta, Petitioner's attorney, for an extension of time to file a Petition for Writ

of Certiorari in this case, Mr. Justice Brennan on the same date so ordered and extended Petitioner's time to and including January 3, 1978. On November 23, 1977, Petitioner, through Mr. Schwartz, his attorney in the prior proceedings, applied to the U.S. Court of Appeals for the Third Circuit for a further stay of mandate to and including January 3, 1978 to enable Petitioner's counsel, Mr. Culotta, to Petition this Court for a Writ of Certiorari, which the appellate court granted on November 28, 1977.

REASONS FOR GRANTING THE WRIT

There is an overriding need for this Court to clarify the interplay of respective discretions of the prosecutor and the trial judge in the criminal process characterized as "plea bargaining". This case is a perfect one for review of this "interplay" when a Rule 11 (e) (1) (C) agreement is rejected by the trial judge, despite the fact that consideration in the form of cooperation was given to the Government and the Petitioner can no longer be restored to the *status quo ante* because codefendants shortly thereafter pleaded guilty. Petitioner submits that under the circumstances of his case, either the trial judge abused his "judicial" sentencing discretion or the Assistant United States Attorney abused his "executive" prosecutorial discretion as authorized by Rule 11 (e) (1) (C).

There are no criteria on the exercise of judicial sentencing or prosecutorial discretion in the process of plea bargaining under Rule 11 (e) (1). Rule 11 (e) (2) does provide that the Court may accept or reject the agreement. However, it does not set forth any criteria for the acceptance or rejection of a plea agreement, especially the setting forth of the Court's reasons when rejecting an agreement. The sentencing and judgment

provisions of Rule 32 contain no criteria on the exercise of the trial judge's sentencing discretion, except to require the probation service to make a presentence investigation and report to the Court, with certain exceptions not here relevant. Further, Rule 32 permits disclosure of the presentence report to the defendant or his counsel, and at the Court's discretion to introduce testimony to rebut inaccurate facts. However, the Rule doesn't provide for review of presentence reports of co-defendants by defendant or his counsel, nor rebuttal of facts in those reports upon which the Court relied to reject the plea bargain agreement and to sentence this Petitioner.

Moreover, it would appear that this Court has had no occasion to consider issues related to the exercise of discretion and its abuses as they relate to plea bargaining agreements under Rule 11 and sentencing under Rule 32 in the context of the facts and circumstances of this case. Constitutional issues pertaining to the "Separation of Powers" and "Due Process of Law" may well need to be examined.

For the purposes of this Petition, Petitioner is in the incongruous posture of, in effect, defending the prosecutor's exercise of sound prosecutorial discretion in the context of his authority in Rule 11 (e) (1) (C), while the prosecutor is supporting and defending the trial judge's exercise of sound sentencing discretion in rejecting the Rule 11 (e) (1) (C) agreement on the basis that the prosecutor abused his discretion.

The facts of this case indicate that the plea bargain agreement was extensively negotiated between the prosecutor and Petitioner. At a Rule 11 plea hearing held on January 5, 1977 – five days prior to the scheduled trial of Petitioner and his co-defendants – the District Court was informed by the prosecutor of the Rule 11 (e) (1) (C) plea bargain agreement. The

Court reserved acceptance or rejection pending a presentence report. On the same day, the prosecutor issued a summons to Petitioner to testify against his codefendants at the trial set for January 10, 1977 (A. 12).

Prior to January 5, 1977, Petitioner and his counsel informed the codefendants that a "deal" had been made with the prosecutor, that Petitioner was changing his plea to guilty, and that he would testify against them. Evidently, whatever defense the codefendants had collapsed with Petitioner's anticipated testimony. Codefendant Light changed his plea to guilty on January 7, 1977 and Pinnon on January 10, 1977. On February 25, 1977, each was sentenced, inter alia, to prison terms of six years.

The Petitioner complied with the plea bargain agreement, although it was not necessary that he testify in view of the codefendants' pleas of guilty.

In the course of four open court pleas and sentencing hearings commencing on January 5, 1977 and ending on March 11, 1977, Petitioner admitted his guilt and participation in the conspiracy and arson as alleged in Counts I and III of the Indictment. Therefore, this is not a case of a defendant pleading guilty yet maintaining his innocence. In rejecting the plea bargaining agreement and accepting Petitioner's insistent plea of guilty, the Court indicated that its reason in sentencing him to an equal prison term of six years, rather than the agreed term of five years on probation, was because it disbelieved Petitioner's extent of participation in the crimes. The Court further stated that it sincerely believed that Petitioner "had a complete one-third role in it". The Court admitted that in forming its opinion it relied on the presentence reports of the

codefendants and argument of their counsel at their sentencing on February 25, 1977.

But the facts remain that codefendant Light, the owner of the building, received $78,100.00 in fire insurance proceeds and succeeded in destroying his company's financial records at a time when he was under audit by the Internal Revenue Service. Further, that codefendant Pinnon, the "hired torch" who, together with Brown, an unindicted co-conspirator, actually set the fire, apparently received approximately 10% of the proceeds, namely $8,000.00. Petitioner did introduce Pinnon to Light; he did drive Pinnon and Brown to the subject premises; Pinnon did agree to pay Petitioner a one-third share of his $8,000.00; and Petitioner actually received no more than $1,800.00.

The prosecutor, with the assistance of the F.B.I. and local authorities, investigated the crimes charged and the Indictment he prepared speaks for itself. He had the responsibility to prove the Government's case and he concluded, within his "executive" prosecutorial discretion, that Petitioner's ". . .testimony was deemed by the government to be important to the case and therefor the bargain was made"; and he so informed the District Court at sentencing on March 11, 1977. Regardless, the District Court ruled that the prosecutor abused his sound prosecutorial discretion in negotiating the plea and sentence agreement, and sentenced Petitioner to a total of six years imprisonment and to stand committed until the fine was paid, rather than five years on probation and $10,000 fine payable within a year.

The Court of Appeals for the Third Circuit, over the objections of Petitioner, permitted the Government to supplement the record with the transcript of a polygraph examination

conducted on March 22, 1977, subsequent to sentencing, by the Federal Bureau of Investigation (without the assistance of counsel), at the trial judge's recommendation, based on the request of Petitioner, together with a letter thereon from the prosecutor to the trial judge. Although Petitioner requested that the appellate record be further supplemented by including Petitioner's Motion for a determination and hearing on the polygraph examination (A. 16), and by the filing of a transcript of the colloquy between the trial judge and codefendant Pinnon at the sentencing of Pinnon, the appellate court failed to grant his requests.

Throughout the pleas, judgment and sentencing hearings, and thereafter, relative to acceptance or rejection of the plea bargain agreement, the imposition of judgment and sentence, and the conduct of the polygraph examination, *it would appear that not only the Court but the Government too was shifting the burden of proof to Petitioner to refute the allegations of codefendants' presentence reports*. Despite Petitioner's request, the trial judge refused him the opportunity to read the presentence reports of the codefendants or to be advised of any statements by them related to Petitioner's background or participation in the crime which were detrimental to Petitioner, so he would have an opportunity to rebut them. Petitioner's challenge to the Assistant U.S. Attorney who made the plea bargain agreement that if he had evidence to refute the contents of Petitioner's presentence report or if he had corroboration of the codefendants' presentence reports, to speak up and put this information on the record, was met with silence. It was apparent to Petitioner that by the demeanor of the Assistant U.S. Attorney, he was not, in fact, fulfilling the Government's obligation to urge upon the Court to grant Petitioner probation.

Petitioner submits that presentence reports of co-defendants, relied on by a trial judge under the circumstances of this bargained plea case, are so inherently unreliable and self-serving that without Petitioner being advised of their contents and being given the opportunity to rebut them, there has been a blatant abuse of sound judicial sentencing discretion. Further, to shift the burden to the Petitioner to refute the statements contained in the presentence reports of the co-defendants – in ignorance of their contents – is fundamentally unfair, amounting to abuse of sentencing discretion under the Due Process Clause.

Admittedly, in the context of this Petition, *Gregg v. United States*, 394 U.S. 489, (1969), is not on point on the subject of the use and abuse of presentence reports. However, Mr. Justice White cites reasons for the timing of the release of the "*ex parte* introduction of this sort of material to the judge". Petitioner was given the opportunity to review his presentence report, but was refused the opportunity to review the reports of the codefendants or to be advised of their contents. The undecided question is whether, under the circumstances of this bargained plea case, the trial judge should be permitted the *ex parte* use of codefendants' presentence reports prior to his acceptance or rejection of the agreement negotiated between the Petitioner and the prosecutor. Petitioner contends that his Due Process rights were violated by the trial judge's sentencing procedure and should be scrutinized by this Court. *Williams v. New York*, 337 U.S. 241, at 252, note 18 (1949); *Gardner v. Florida*, 430 U.S. 349, (1977).

This Court has declared that plea bargaining is an essential component of the criminal process which, if properly administered, is to be encouraged. *Santobello v. New York*, 404 U.S.

257, 260 (1971). Recently, this Court again approved of plea bargaining in *Blackledge v. Allison*, 431 U.S. 63 (1977).

While this Court in *Santobello*, supra, agreed unanimously to reverse the Supreme Court of the State of New York, the Court split 3 to 3 on whether or not the plea bargain must be specifically enforced. Santobello's sentence was vacated and remanded by Mr. Chief Justice Burger ruling as follows:

> "The ultimate relief to which petitioner is entitled we leave to the discretion of the state court which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced before a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by the petitioner, i.e., the opportunity to withdraw his plea of guilty. . ."

However, in the herein Petition, the Petitioner insists that he does not want to withdraw his plea; rather, he seeks specific performance of the Agreement, or in the alternative to be sentenced by a different judge in a different district and the plea bargain recommended by a different assistant United States Attorney.

In the instant case, as in *United States v. Ammidown*, 497 F.2d 615 (C.A. D.C. 1973), the issue before the court was the exercise of discretion by the trial court to reject a plea bargain because it was of the opinion that the bargain was not in the best interest of justice and that the public interest required that the defendant be tried on a greater charge. The defendant in *Ammidown*, who was charged with first degree

murder, sought to plead guilty to second degree murder in exchange for his testimony against his accomplice. On appeal the Court of Appeals for the District of Columbia Circuit held that the trial judge exceeded his discretion and accordingly reversed. The appellate court, in vacating the judgment and sentence on conviction of murder in the first degree and remanding with instruction that the District Court accept defendant's plea to second degree murder, inter alia, ruled as follows:

> "Because the trial judge did not provide a statement of reasons based on intrusion of the sentencing authority of the judge, it would be necessary to remand in any event . . . We are required to accompany our reversal for lack of requisite findings with a disposition in the interest of justice, see 28 U.S.C. §2106, that takes into account current conditions. See *Coleman v. United States*, 123 U.S. App. D.C. 103, 157 F.2d 563 (en banc 1965)."

Amidown, supra, would appear to stand for the proposition that the trial court is not free to reject a plea bargain simply because the court's conception of the public interest differs from that of the prosecutor and that it can only do so in blatant and extreme cases.

In *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975), cert. denied *sub. nom. U.S. v. Woodruff*, 425 U.S. 971, the Court of Appeals for the Fifth Circuit held that the District Court abused its discretion in rejecting a plea bargain whereby the defendant was to plead guilty and give cooperation to the government in the District Court for the District of Columbia in exchange for dismissal of an Indictment in the Northern District of Texas. The bargain was rejected by the Texas District

Court because as in *Ammidown*, supra, and the instant case, it thought that the bargain was not in the best interest of justice.

One of the critical elements in both *Ammidown*, supra, and *Cowan*, supra, as in the instant case, was that the plea bargain did not merely entail an agreement by the defendant in exchange for a recommendation for sentence or reduction of charges, but also the cooperation of the defendant. The necessity and importance of that cooperation is peculiarly a matter within the province of the prosecutor.

By definition, case law and statute, the plea bargain process is peculiarly a prosecutorial function. Petitioner submits it is more correct to argue that the trial court interposed itself in what is basically a prosecutorial function when it rejected the plea bargain, than to argue that the prosecutor improperly limited the trial court's discretion to sentence by entering into a "bad bargain".

In *Palermo v. Warden*, 545 F.2d 286 (2nd Cir., 1976) [certiorari to this Court dismissed on account of death of petitioner, 1977], the defendant not only pleaded guilty but also agreed to return and, in fact, did return stolen jewelry in consideration for an unfulfillable promise by the prosecutor relating to parole. In spite of the fact that the promise of the prosecutor was *ultra vires*, the court ordered specific performance of the plea bargain and quoting *Santobello v. New York*, 404 U.S. 257, stated:

> ". . .when a plea rests in any significant degree on a promise or agreement of the prosecutor. . . such promise must be fulfilled."

Palermo, supra, is one of the few cases in which consideration was given by the defendant and received by the government in addition to the simple plea of guilty. What is most critical and relevant in *Palermo* to the instant case is the remedy of specific performance afforded by the Court.

Plea bargaining is an essential component of the criminal process and as this Court further said if properly administered, is to be encouraged. However, results such as occurred to the Petitioner surely will discourage plea bargains, thereby depriving to the government, the administration of justice and to the defendant the mutual benefits and advantages that would inure to each of them. There is indeed an overriding need for this Court to clarify the interplay of respective discretions of the prosecutor and the trial judge in the plea bargaining process. This case provides the facts and the reasons for this Court to speak clearly to the issues raised by this Petition.

CONCLUSION

For the foregoing reasons the Petitioner, JOSEPH N. ZANNINO, JR., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

SAMUEL A. CULOTTA,

Attorney for Petitioner.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-1462

UNITED STATES OF AMERICA

v.

JOSEPH N. ZANNINO, JR.
APPELLANT

(CRIMINAL NO. 76-131-2)

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued October 7, 1977

Before: SEITZ, Chief Judge, and STALEY AND HUNTER, Circuit Judges

JUDGMENT ORDER

After considering the contentions of the appellant that the district court committed error in (1) not accepting the plea agreement between the appellant and the government, (2) imposing the sentence on the basis of unreliable, unrevealed information about the appellant, (3) in imposing what was in fact a sentence for perjury, and (4) in failing to grant the appellant's motion to vacate the sentence and allow resentencing by another judge, and that reversal is required because the government failed to live up to the terms of the plea agreement; IT IS

ADJUDGED AND ORDERED that the judgment of the district court be and hereby is affirmed. Appellee's motion filed May 31, 1977 for leave to supplement the record is granted.

By the Court,

/s/ Seitz
Chief Judge

ATTEST:

/s/ Thomas F. Quinn

DATED: October 11, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1462

UNITED STATES OF AMERICA

v.

JOSEPH N. ZANNINO, JR.,
Appellant

(Criminal No. 76-131-2)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, STALEY, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Chief Judge Seitz

Dated: November 4, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

JOSEPH N. ZANNINO

Criminal No. 76-132-2

EXCERPT FROM DOCKET ENTRIES

Date - March 11, 1977

Proceedings

"JUDGMENT & COMMITMENT –

IT IS ADJUDGED ON CT. I that the deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for impr. for a term of 1 yr., and fined the sum of $10,000.

The deft. is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

IT IS ADJUDGED ON CT. II [sic] that the deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for impr. for a term of 5 yrs. Said sent. to run consecutively to the sent. imposed on Ct. I.

As to the sent. imposed on Ct. III the deft. shall become eligible for parole under Title 18 USC Sec. 4205 (b) (2) at such time as the Parole Commission may determine. Execution of sent. is stayed until April 11, 1977. The deft. is to turn himself in to the U.S. Marshal at Hsbg. on that date. (H) "

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1462

UNITED STATES OF AMERICA

v.

JOSEPH N. ZANNINO, JR.,
Appellant

Pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 4, 1977.

/s/ Chief Judge Seitz

Dated: November 15, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1462

UNITED STATES OF AMERICA

v.

JOSEPH N. ZANNINO, JR.,
Appellant

Pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until January 3, 1978.

/s/ Chief Judge Seitz

Dated: November 28, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(Filed September 23, 1976)
Harrisburg, Pa.

Criminal No. 76-131-2

VIO: 18 U.S.C. §371, §1952 and §2

UNITED STATES OF AMERICA

v.

RONALD E. LIGHT,
JOSEPH N. ZANNINO, JR. and
HERMAN PINNON

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

A. From on or about September 15, 1975 to on or about February 1, 1976, in the Middle District of Pennsylvania,

RONALD E. LIGHT
JOSEPH N. ZANNINO, JR., and
HERMAN PINNON

defendants' herein, did unlawfully, wilfully and knowingly, combine, conspire, confederate and agree with each other and with CARL FLETCHER and JAMES BROWN, unindicted co-conspirators not herein named as defendants and with others unknown to the Grand Jury to commit an offense against the United States, that is, violation of Title 18 U.S.C. §1952 in that the defendants, JOSEPH N. ZANNINO, JR., and HERMAN PINNON would travel and defendant RONALD E. LIGHT would aid, abet, counsel, command, induce, and procure said travel in interstate commerce with the intent to

promote, manage, establish, carry on, and facilitate, the promotion, management, establishment and carrying on of an unlawful activity, that is, arson in violation of the law of Pennsylvania, to wit: Title 18 C.P.S.A. §3301, and thereafter perform and attempt to perform acts to promote, manage, establish, carry on, and facilitate the promotion management, establishment, and carrying on of said unlawful activity;

B. It was part of the conspiracy that insurance monies would be paid as a result of the arson and it was further a part of the conspiracy that the defendant, RONALD E. LIGHT, would pay his coconspirators for their participation in the scheme.

C. In furtherance of the conspiracy and to effect the object thereof the defendants and coconspirators did commit, among others, the following overt acts in the Middle District of Pennsylvania and elsewhere:

1. On or about September 15, 1975, HERMAN PINNON and CARL FLETCHER flew from the State of Tennessee to the State of Maryland;

2. On or about September 15, 1975, HERMAN PINNON and CARL FLETCHER met with JOSEPH N. ZANNINO, JR.;

3. On or about September 16, 1975, HERMAN PINNON, JOSEPH N. ZANNINO, JR., and CARL FLETCHER drove from the State of Maryland to Lebanon, Pennsylvania;

4. On or about September 16, 1975, JOSEPH N. ZANNINO, JR., HERMAN PINNON, and CARL FLETCHER met with RONALD E. LIGHT;

5. On or about September 17, 1975, JOSEPH N. ZANNINO, JR., HERMAN PINNON, and CARL FLETCHER met with RONALD E. LIGHT;

6. On or about September 29, 1975, HERMAN PINNON and JAMES BROWN flew from the State of Tennessee to the State of Maryland;

7. On or about September 29, 1975, HERMAN PINNON and JAMES BROWN met with JOSEPH N. ZANNINO, JR.;

8. On or about September 30, 1975, JOSEPH N. ZANNINO, JR., HERMAN PINNON and JAMES BROWN drove from the State of Maryland to Lebanon, Pennsylvania;

9. On or about September 30, 1975, JOSEPH N. ZANNINO, JR. and HERMAN PINNON met with RONALD E. LIGHT;

10. On or about October 1, 1975, JOSEPH N. ZANNINO, JR., and HERMAN PINNON met with RONALD E. LIGHT.

11. On or about October 2, 1975, JOSEPH N. ZANNINO, JR., HERMAN PINNON, and JAMES BROWN drove to the premises of the Light Coach Company, Lebanon, Pennsylvania;

12. On or about October 2, 1975, HERMAN PINNON and JAMES BROWN set a fire at the Light Coach Company, Lebanon, Pennsylvania;

13. On or about December 12, 1975, RONALD E. LIGHT endorsed a check from Insurance Company of North America for $5,600.00;

14. On or about January 16, 1976; RONALD E. LIGHT endorsed a check from Insurance Company of North America for $72,500.00.

All in violation of Title 18 U.S.C. §371.

THE GRAND JURY FURTHER CHARGES:

COUNT II

On or about September 29, 1975 and September 30, 1975 in the Middle District of Pennsylvania,

HERMAN PINNON

did travel in interstate commerce from the State of Tennessee to the Commonwealth of Pennsylvania, and

RONALD E. LIGHT

did aid and abet, counsel, command, induce and procure said travel to interstate commerce, with the intent to promote, manage, establish carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is arson in violation of the law of Pennsylvania, to wit: Title 18 C.P.S.A. §3301 and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity.

All in violation of Title 18 U S.C. §1952 and §2.

THE GRAND JURY FURTHER CHARGES:

COUNT III

On or about September 30, 1975, in the Middle District of Pennsylvania,

JOSEPH N. ZANNINO, JR.

did travel in interstate commerce from the State of Maryland to the Commonwealth of Pennsylvania, and

did aid, abet, counsel, command, induce and procure said travel in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is arson in violation of the law of Pennsylvania, to wit: Title 18 C.P.S.A. §3301 and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity.

All in violation of Title 18 U.S.C. §1952 and §2.

A TRUE BILL

/s/ William C. Kuhn
Foreman

Dated: September 23, 1976

/s/ J. Phillip Krajewski
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

RONALD E. LIGHT, et al

No. 76-131

Subpoena to Testify

To Joseph N. Zannino, Jr.

You are hereby commanded to appear in the United States District Court for the Middle District of Pennsylvania at U.S. Attorney's Office, Room 1078, Federal Bldg., 228 Walnut St. in the city of Harrisburg, Pa. on the 10th day of January 1977 at 9:00 o'clock A.M. to testify in the above-entitled case.

This subpoena is issued on application of the UNITED STATES.

January 5, 1977

J. Phillip Krajewski,Asst. U.S. Atty.
United States of America
Harrisburg, Pa.

/s/ Donald R. Berry,
Clerk

/s/ Carol L. Flecher
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

JOSEPH N. ZANNINO, JR.

Criminal No. 76-131-2

MOTION TO REDUCE ILLEGAL SENTENCE OR TO HAVE THE SENTENCE VACATED AND FOR SENTENCING BE IMPOSED BY A DIFFERENT JUDGE FROM A DIFFERENT DISTRICT WITH THE PLEA BARGAIN URGED UPON THE SENTENCING JUDGE BY A DIFFERENT ASSISTANT UNITED STATES ATTORNEY

1. The defendant was charged in two counts of a three count indictment with violation of Title 18 United States Code §371-Conspiracy; and, Title 18 United States Code §1952, traveling in interstate commerce to promote an unlawful activity; to wit, arson. The defendant entered into a plea bargain with the Assistant United States Attorney prosecuting the case with the terms of the bargain being the following:

(a) The defendant would plead guilty to both counts of the indictment, admitting his guilt therein;

(b) The defendant would give a detailed statement as to the participation of the other defendants and co-conspirators;

(c) The defendant would testify against the other defendants if they proceeded to trial;

(d) The government would agree that a specific sentence, to wit, five (5) years probation and Ten Thousand

Dollars ($10,000.00) fine would be the appropriate disposition of the case.

The defendant at all times abided by the terms of his plea agreement, and was prepared to testify against his co-defendants. This was not required of him as the co-defendants, in turn pleaded guilty.

2. On February 25, 1977, which time the defendant was scheduled for sentencing, he was advised by the Court that the Court would not accept the plea bargain entered into between him and the Government. At that time, the Assistant United States Attorney prosecuting the case, J. Philip Krajewski, was not in attendance and the sentencing was being handled by Assistant United States Attorney Paul Killion. Mr. Killion did not say one word in an effort to urge upon the Court to accept the plea bargain. Sentencing was rescheduled for March 4, 1977.

3. On March 4, 1977, Assistant United States Attorney J. Philip Krajewski, who was the prosecuting attorney, and who entered into the plea bargain with the defendant, was in attendance. He, however, totally failed, in accordance with his legal commitment, to urge upon the Court to accept the plea bargain. Sentencing was continued until March 11, 1977.

4. On March 11, 1977, when sentence was imposed, Mr. Krajewski feebly recited the terms of the plea bargain, and merely stated that the Court should accept it. It was apparent, however, by Mr. Krajewski comments, demeanor and tone of voice that he was not, in fact, abiding by his commitment and fulfilling the Government's obligation to urge upon the Court to accept the plea bargain.

5. The Court stated that it deemed the plea bargain an abuse of the prosecutor's discretion, and that he was rejecting it because the official version of the facts indicated that the defendant's participation in the crime was much greater than

revealed to either the Government or to the Court when he changed his plea to guilty. The Court indicated that the information it was relying upon was a result of statements made by the co-defendants and without corroboration, thereof.

6. The sentence of incarceration imposed by the Court is illegal because of the following:

(a) The Government failed to fulfill its commitment and urge upon the Court to accept the plea bargain;

(b) The rejection of the plea bargain by the Court and the imposition of a sentence less favorable than the terms agreed by the plea bargain is in the nature of a "perjury sentence".

WHEREFORE, the defendant requests that his sentence be amended to comply with the terms of the plea bargain or, in the alternative, that the sentence be vacated and that sentencing be imposed by a Judge from a different District, and that the plea bargain be urged by an Assistant United States Attorney other than Mr. Krajewski.

Respectfully submitted,

/s/ Victor L. Schwartz

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

JOSEPH N. ZANNINO, JR.

Criminal No. 76-131-2

MOTION FOR DETERMINATION AND HEARING ON THE POLYGRAPH EXAMINATION

NOW COMES the defendant by his counsel, and moves that a determination on the record be made with a hearing establishing the results of the polygraph examination.

1. On March 11, 1977, when being informed that the Court did not believe the defendant's statements relating to the participation in the crimes to which he pleaded guilty, the defendant requested that the Government give him a polygraph examination.

2. Pursuant to the Court's recommendation, the polygraph examination was arranged by the United States Attorney's Office, and was conducted on March 22, 1977, by a polygraph expert from the FBI.

3. The test was conducted without the presence of counsel, and the defendant avers that prior to and during the examination the FBI Agent asked the defendant questions such as the following:

(a) Did you ever bury persons in violation of the laws of the State of Maryland Funeral Licensing Board?

(b) Did you ever file false tax returns?

Questions of this nature violated the rights of the defendant under the Fourth, Fifth and Sixth Amendments of the United States Constitution. In addition thereto, it would appear that they would invalidate the reliability of the examination.

4. By a telephone conversation, Assistant United States Attorney, J. Philip Krajewski advised counsel for the defendant that the defendant was "flagged" on several of the important questions.

The defendant himself was advised by the FBI Agent who rendered the examination, that he had "showed a reaction."

5. The defendant is entitled to and requests that he be provided with the following information:

(a) A verbatim "transcript" of each and every question asked of the defendant immediately prior to and during the examination;

(b) A verbatim "transcript" of the defendant's answers to these questions;

(c) An opportunity to inspect and have examined by an expert the tracings or readings of the defendant's reactions when providing the answers;

(d) A definitive statement by the examiner as to his opinion as to the "*results*" of each and every question;

(e) The bases for the examiner's opinion;

(f) An opportunity to cross-examine the examiner and have a hearing on the examination if the defendant is advised that he "failed" the polygraph examination.

Respectfully submitted,

/s/ Victor L. Schwartz
Attorney for Defendant